88-2087

Supreme Court, U.S.
FILED
JUN 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ____

NATIONAL AUTOMATIC PRODUCTS CO.,

Petitioner,

v.

AMERICAN AIRLINES, INC.
(Ex-Cell-O Corporation Real Party in Interest),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

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June 2, 1989

QUESTION PRESENTED

This case presents the question whether the mere intention of a Connecticut manufacturer to sell its products nationwide, and the awareness of the manufacturer that its product would reach everywhere an aircraft flies or is serviced, constitutes "minimum contacts" between the manufacturer and the forum state, such that the exercise of jurisdiction by the forum state over the manufacturer "does not offend 'traditional notions of fair play and substantial justice' " so as not to violate due process.

LIST OF PARTIES

Ex-Cell-O Corporation acquired by settlement the claim of American Airlines, Inc.

Commercial Technology, Inc.

Comtec, Inc. is a subsidiary of Commercial Technology, Inc.

National Automatic Products Co. is a subsidiary of Comtec, Inc.

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Constitutional Provisions and Statutes:

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OPINIONS BELOW

The Opinions of the Oklahoma Supreme Court which appear in the appendix hereto p. D-1, infra, are not printed.

The Opinions of the Oklahoma Court of Appeals, 4th District, dated March 7, 1989, in the appendix hereto p. B-1, infra, are not printed. The mandate of the Oklahoma Supreme Court, dated April 6, 1989, appears in the appendix hereto p. A-1.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ____

NATIONAL AUTOMATIC PRODUCTS CO.,

Petitioner,

vs.

AMERICAN AIRLINES, INC.
(Ex-Cell-O Corporation, Real Party in Interest),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

JURISDICTIONAL STATEMENT

National Automatic Products Co., Petitioner, petitions for a writ of certiorari to the Supreme Court of Oklahoma which issued its mandate April 6, 1989. Said judgment of the Supreme Court of Oklahoma held it is constitutional under the Fifth and Fourteenth Amendments to the United States Constitution to exercise jurisdiction over an out of state manufacturer who sold and delivered his products out of state which were subsequently carried into the forum state by Respondent. 28 U.S.C. Section 2403(b) may be applicable.

This petition arises from a tort action for strict liability brought in the District Court of Tulsa County, Oklahoma. The District Court dismissed the case for lack of in personam jurisidiction. See p. E-1, infra. The judgment of the Supreme Court of Oklahoma on the constitutional claim of in personam jurisdiction reversed and remanded the case for trial on the merits. See p. D-1, infra.

Judgment was entered for Plaintiff and Notice of Appeal duly filed to the Supreme Court of Oklahoma. In accordance with Oklahoma rules of appellate procedure, the case was forwarded to the Oklahoma Court of Appeals, Division 4 which rendered its Opinion on March 7, 1989. See p. B-1, infra. The opinion of the Oklahoma Court of Appeals, Division 4 was affirmed by the Oklahoma Supreme Court and mandate issued on April 6, 1989.

This petition is being docketed in this Court within 90 days from the last opinion of the Oklahoma Court of Appeals, 4th Division and the mandamus of the Oklahoma Supreme Court, dated April 6, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

CONSTITUTIONAL PROVISIONS AND STATE LAW

Fifth Amendment, United States Constitution:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Fourteenth Amendment, United States Constitution:

No State shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

12 Oklahoma Statutes 1981, Section 1703.03

"(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's

(1) transacting any business in this state;

(2) contracting to supply services or things in this state;

(3) causing tortious injury in this state by an act or omission in this state;

(4) causing tortious injury in this state by act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;

(5) having an interest in, using, or possessing real property in this state; or

(6) contracting to insure any person, property, or risk located within this state at the time of contracting, or

(7) maintaining any other relation to this state or to persons or property including support for minor children who are residents of this state which affords a basis for the exercise of personal jurisdiction by this state consistently with the Constitution of the United States.

(b) When jurisdiction is based solely upon this section, the defendant's appearance does not authorize the exercise of personal jurisdiction except as to a cause of action or claim for relief arising in the circumstances enumerated in this section."

STATEMENT OF THE CASE

American Airlines, Inc. (hereinafter "American"), purchased jet engines from United Technologies, Inc. (hereinafter "United") and its subsidiary Pratt & Whitney (hereinafter "P&W"). P&W designed the jet engine pursuant to federal government standards and utilized military standards, sampling procedures and tables for inspection by attributes. P&W sets and establishes the quality assurance specifications for all companies desiring to bid on and be approved as manufacturers of parts for their jet engines. The quality assurance specifications conformed to military standard sampling procedures for quality control. P&W purchased from Ex-Cell-O

Corporation, a Michigan corporation, (hereinafter "Ex-Cell-O") the fuel nozzle nut in question at a price of $46.98. The nuts were subject to P&W's quality control standards, and were ultimately installed in airplane engines. P&W designed the nut, established the specifications for it, and had one of its own representatives inspect the nuts for heat tolerance and dimensions. Petitioner, National Automatic Products Co., a Connecticut corporation (hereinafter "NAPCO") agreed to manufacture and sell to Ex-Cell-O in Michigan an unfinished nut for $23.00. The unfinished nut had a random sampling inspection of one out of eighty per P&W purchase order and military standards sampling procedures. The nut was manufactured by NAPCO from steel approved by P&W, and then inspected by P&W on a gauge approved by P&W. This sampling procedure was called for by P&W. There was not a heat inspection requirement by P&W inspection procedures. The unfinished nut then was delivered "F.O.B. Connecticut" to Ex-Cell-O's Michigan plant who ground it, put a hard coat on it, removed any excess lubricants, checked all sealing surfaces, and tested every nut by screwing the same down on a false nozzle. See p. D-2, infra. These inspections were monitored by the on site P&W representative. Ex-Cell-O and P&W also inspected the nut in a heated environment. Then Ex-Cell-O shipped the nut "F.O.B." to United at their P&W plant in Connecticut. United then sold the JT-9 Engine containing the nuts to American "F.O.B. New York."

On December 29, 1980, a fire occurred inside an American Airlines airplane engine and test cell in Tulsa, Oklahoma resulting in damage to both the engine and the test cell. Industrial Risk Insurers, American's insurer, brought subrogation actions in Tulsa County, Oklahoma and in Connecticut against United, Ex-Cell-O and NAPCO. American alleged that the damages were caused by a faulty fuel nozzle nut, which became heated, enlarged in size, loosened, and allowed too much fuel to spurt into the engine. Additionally, American Airlines alleged that there was a blemish in the nut which

prevented it from being screwed completely down on the fuel nozzle and that the nut's internal diameter was too small by .044 of an inch. NAPCO denied that the damages were caused by the nut and demonstrated an alternative cause of the fire. The nut was made from steel approved by P&W and passed all the quality controlled inspections of P&W and Ex-Cell-O. Thereafter the petition was amended to add Commercial Technology (hereinafter "Commercial") and Comtec, Inc., a Berlin, Connecticut based company, which owns the stock of NAPCO. Commercial, a Texas corporation, owns part of the stock of Comtec, Inc. American brought suit against all vendors, based upon manufacturers products liability, negligence, breach of implied warranty of merchantability, and strict liability. Ex-Cell-O cross-claimed against NAPCO for indemnification. Ex-Cell-O brought claims against Comtec, Inc., and Commercial based upon "alter ego" and "corporate veil" theories.

All of the defendants objected to the in personam jurisdiction of the Oklahoma court by proper motion. The trial court dismissed the case against all of the defendants. The trial court found that suit had also been filed in Connecticut which had subject matter jurisdiction, that title to the nut had passed to American in Connecticut, that the JT-9 engine containing the nut was brought into the state of Oklahoma by American, and that there was no evidence of any affirmative action of any of the defendants within Oklahoma so as to seek protection and advantage of the laws of Oklahoma.

The Oklahoma Supreme Court, by a 5-4 decision, reversed the trial court decision and remanded the case for trial. The Oklahoma Court cited a NAPCO representative, stating that his company "intended to serve as much of the national market as it could." Also American estimated that it received 492 nuts resulting in revenues to NAPCO of $14,760 to $24,000, (contrary to the finding of facts that title passed to American in Connecticut).

Prior to trial, Industrial Risk Insurers settled with United for $5,000.00. Industrial Risk Insurers then settled with Ex-Cell-O for $600,000.00, which was paid by Aviation Underwriters, Inc. of Troy, Michigan. Ex-Cell-O then proceeded to trial against NAPCO, Commercial and Comtec, Inc.

The Oklahoma trial court then issued NAPCO a stiff dose of Oklahoma justice. Two business days prior to trial, NAPCO's expert witness suffered two broken ankles and a back injury and could not attend the trial. The court denied a motion for continuance. NAPCO then moved to utilize the expert's deposition; that motion was denied. The court further denied NAPCO's request to substitute another expert witness based upon lack of notice. During the trial, the court allowed certain evidence over the objections of Appellants. The evidence presented concerned: (1) actions related to piercing the corporate veil, which actions occurred after the fire which is the cause of this action, and (2) a conviction of the principal officer of Commercial. The trial judge recognized that this evidence was extremely prejudiced as to NAPCO's case. The jury returned a verdict against NAPCO, and during a bifurcated proceeding, returned a verdict against Commercial. Comtec, Inc., the subsidiary of Commercial Technology, Inc., was held not liable for any damages. Judgment was entered against NAPCO and Commercial for a total of $944,545.90 plus prejudgment interest as specified in the judgment of the court. See p. C-1, infra.

The nut was not a completed item when it was delivered to Ex-Cell-O and, in fact, was made prior to 1976 pursuant to P&W specifications. The specifications were later changed due to a number of problems with its design. A witness for American Airlines admitted in his testimony that with respect to damages caused by the engine fire, labor costs related to repairs had been calculated at the exceedingly high rate of 217.6% of actual cost.

NAPCO and Commercial both filed timely motions for new trial which were overruled. NAPCO and Commercial then

appealed to the Oklahoma Supreme Court. The Oklahoma Supreme Court referred the case to the Court of Appeals, Division 4, pursuant to the Oklahoma rules of appellate procedure.

After briefing, but before the decision, Ex-Cell-O and Commercial settled for $250,000.00 dismissing the appeal as to Commercial only.

The Oklahoma Court of Appeals, Division 4 issued its opinion on March 7, 1989, holding that the issue of personal jurisdiction had already been decided by the Oklahoma Supreme Court. See p. B-3, infra. A motion for rehearing was filed and a mandamus issued affirming the decision of the Oklahoma Supreme Court on April 6, 1989. See p. A-1, infra.

NAPCO respectfully refers the Court to the unpublished January 29, 1985, opinion of the Supreme Court of Oklahoma, reversing and remanding the nunc pro tunc order of the District Court in this case, which dismissed the case against the Defendant for lack of personal jurisdiction, p. D-1, infra. NAPCO is a Connecticut corporation which has its offices and plant facilities in Connecticut. NAPCO never did business in Oklahoma nor has it ever done business in Oklahoma. NAPCO never maintained any offices, had any employees, or owned any property in Oklahoma, nor appointed an agent for service of process in the state. There was no advertising or solicited business in Oklahoma. In fact, NAPCO never conducted any business of any nature in Oklahoma, not even of the most cursory nature. The product was not designed for sales in Oklahoma. In Connecticut, NAPCO manufactured the unfinished nut in question and sold it to Ex-Cell-O in Michigan. Ex-Cell-O finished the nut and used it in a fuel nozzle assembly which it sold to P&W in Connecticut, who sold it to American in New York, and which ultimately ended up in an airplane engine at the American Airlines facility in Oklahoma. NAPCO had no contacts, minimum or otherwise, with Oklahoma; therefore, personal jurisdiction over NAPCO simply never

existed in the trial court. This issue was properly and timely raised by special appearances filed by each defendant including NAPCO and was raised and ruled on previously in a 5-4 decision of the Oklahoma Supreme Court, which found personal jurisdiction to be proper.

RAISING THE FEDERAL QUESTION

At the earliest available stage of this litigation all Defendants including Petitioner raised the constitutional question of due process by special appearance. The trial court dismissed the case for lack of jurisdiction by the Oklahoma Court over the persons of the Defendants, which included the Petitioner. See opinion below. p. E-1, infra. The due process claims were appealed to the Oklahoma Supreme Court which reversed the decision of the trial court and remanded for trial. See opinion below. p. D-1, infra. After trial and judgment the constitutional question was again raised on appeal. The Supreme Court referred the case to the Court of Appeals, Division 4, which held that the constitutional question had already been decided by the Oklahoma Supreme Court. See decision below. p. B-1, infra. The opinion of the Oklahoma Court of Appeals, Division 4 was affirmed by the Oklahoma Supreme Court. See below, p. A-1, infra. The Oklahoma Supreme Court thus considered and rejected these federal constitutional claims.

ARGUMENT

Industrial Risk Insurers fought hard to obtain jurisdiction in the State of Oklahoma. There is a conflict between Oklahoma state tort law, i.e., strict liability in a product liability setting, and the tort law of the states of Connecticut and Michigan, i.e., negligence concepts. Thus, while NAPCO was held to a standard of strict liability in Oklahoma, in Connecticut or Michigan, the corporation would be held to a less stringent standard of conduct.

The contracts between the parties referred to the standards of quality control required as being government standards, i.e., MLT-STD-105D. Oklahoma law is void on the subject of aerospace high technology contract law. The fundamental question in a product liability setting is the standard of care required by the manufacturer. The standards of care can be defined by the inspection standards and procedures in the contract. The sampling procedure, MLT-STP-105D, called for a random sample test. On a sampling agreement, it is foreseeable that there is going to be a rejection rate based on the acceptable quality level designated. Thus, if the nut passed inspection, it follows that NAPCO met the degree of care contractually required in manufacturing the nut. The burden of proof of a reasonable inspection was on P&W who was not before the court, and no evidence on this issue was presented.

The conflict is that under Oklahoma law an innocent contractor who merely complied with his contract was held ultimately liable for a dangerous quality control design when the responsibility lies elsewhere under the tort law of Connecticut and Michigan. This was true notwithstanding the dictates of principles of fairness.

NAPCO had no minimum contacts with the forum state of Oklahoma. NAPCO never purposefully engaged in forum activities. Oklahoma has no interest in imposing strict liability on government standard procurement contracts. The shared interests of the other states are to the contrary. Exercising jurisdiction wherever an airplane may land or be serviced is unreasonable.

Oklahoma's long arm statute goes to the outer limits permitted by due process requirements of the Federal Constitution. *Glidewell Motors, Inc. v. Pate*, 577 P.2d 1290 (Okla. 1978). In order to have personal jurisdiction over a defendant, that defendant must have purposefully availed itself of the privilege of conducting its activity in the forum state. *Crescent Corporation v. Martin*, 443 P.2d 111 (Okla. 1968). Here, there

are clearly insufficient contacts between NAPCO and Oklahoma. *Barnes v. Wilson*, 580 P.2d 991 (Okla. 1978). The very situation presented in the case at bar has already been addressed by the United States Supreme Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), in which the High Court ruled that "foreseeability" is not enough to impose jurisdiction on a defendant under the Due Process Clause. That a company "intends" to serve a nationwide market is obviously not sufficient to constitute "minimum contacts" for constitutional purposes. Significantly, the Oklahoma Supreme Court ignored and refused to follow *World Wide Volkswagen Corp.*, although they had just been overruled by that same decision.

The reasoning of the Oklahoma Supreme Court is strained. There was testimony that NAPCO "intended to serve as much of the nationwide market as it could" and expected that the nuts would "end up" at whatever service facility demanded them. Additionally, the Oklahoma Supreme Court reasoned that when American received 492 nuts in New York resulting in $14,760.00 to $24,000.00 gross revenues to NAPCO, a tie to Oklahoma was somehow formed. This was the total sum of minimum contacts. See p. D-7, infra.

This Honorable Supreme Court restated the test in the recent case of *Asahi Metal Industry Co., Ltd. v. Superior Court of California, Salano County*, 107 S. Ct. 1026 (1987). The case had a plurality opinion. In either test NAPCO has been denied due process. The first test requires that "the substantial connection" between the defendant and the forum state must result "by an action of the defendant purposefully directed toward the forum state." *Id.* at 1033. Merely placing a product in the stream of commerce is not a purposeful act toward the forum state. Due process requires additional conduct by the defendant to serve that forum, *Id.* at 1032, 1033.

NAPCO has never sold its product to a resident of Oklahoma. No citizen or resident of Oklahoma buys nuts for

fuel nozzle assemblies to JT-9 Jet Engines. NAPCO never purposefully engaged in forum activities.

In part II B, the court further stated that even if the defendant in *Asahi* had minimum contacts, it would still be unreasonable and unfair for jurisdiction to be exercised in California. *Id.* at 1034. Reasonableness of jurisdiction should be determined by a consideration of "the burden on the defendant, the interest of the forum state . . . the plaintiff's interest in obtaining relief . . . the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of several states in furthering fundamental substantial social policies" *Id.* at 1033-34.

Applying these factors to the case at hand, it is clear that Oklahoma's exercise of jurisdiction over NAPCO exceeds the bounds of reasonableness. In *Asahi*, the defendant's burden of having to defend in California was great since they had to travel so far and then they were subjected to a foreign legal system. *Id.* at 1034. Likewise, NAPCO is burdened by both having to travel to Oklahoma to defend and also by being subjected to Oklahoma's strict products liability law that is foreign to both the legal systems of Connecticut and Michigan. Moreover, American's interest in obtaining relief could be met in either Connecticut or Michigan instead of forcing NAPCO to defend in Oklahoma.

Most importantly, Oklahoma's interest in this suit is little as compared to Connecticut, which was where the part was bought and where title passed, or to Michigan, which was where the part was manufactured. The defendant in *Asahi* "did not create, control, or employ the distribution system that brought its valves to California" *Id.* at 1033. Similarly, NAPCO did not create or control the method by which the nozzle nut entered Oklahoma, for it was brought there by American.

When factoring in the interstate judicial system's interest, it can be seen that there are two other states, namely Connecticut and Michigan, that have an interest in Oklahoma's assertion of

jurisdiction over NAPCO. While jurisdiction was being contested in Oklahoma over a long period of time, the most efficient resolution of the controversy could have taken place in either Connecticut or Michigan. Once all these factors are weighed, it is evident that jurisdiction by Oklahoma over NAPCO would be both unfair and unreasonable. The facts of this case do not establish minimum contacts such that the exercise of personal jurisdiction is consistent with "fair play and substantial justice." *International Shoe Co. v. Washington*, 66 S. Ct. 154, 158 (1945).

Oklahoma really has no interest in this case at all. After acquiring title to the nuts in New York, American brought the JT-9 engine to Oklahoma. Accordingly, we need not address the *Asahi* test that could arise if the product was regularly sold in the forum state. *Asahi* at 1035.

The ruling of the Supreme Court of Oklahoma which found in personam jurisdiction over NAPCO must be reversed and this action must be dismissed against NAPCO because the trial court lacked personal jurisdiction and the judgment of that court in this case was null and void as to NAPCO.

CONCLUSION

FOR THE ABOVE REASONS, this Honorable Court should issue a writ of certiorari to the Supreme Court of Oklahoma and the Judgment of the Oklahoma Court should be Reversed for lack of In Personam Jurisdiction and held null and void and of no force and effect.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX "A"

STATE OF OKLAHOMA
SUPREME COURT } ss.:

DISTRICT COURT
FILED
APR 13 1989
DON E. AUSTIN,
COURT CLERK
STATE OF OKLA.
TULSA, COUNTY

AMERICAN AIRLINES, INC.
EX-CELL-O CORP.

VS.

NATIONAL AUTOMATIC
Products Co.
Commercial Technology, Inc.

No. 68,771
TULSA, COUNTY
DISTRICT COURT
CT82739

THE SUPREME COURT OF OKLAHOMA:

TO THE HONORABLE JUDGE OF THE DISTRICT COURT OF TULSA COUNTY IN SAID STATE OF OKLAHOMA.

WHEREAS, THE COURT OF APPEALS OF THE STATE OF OKLAHOMA, DID ON THE 07TH DAY OF MARCH, 1989 RENDER A MEMORANDUM OPINION IN THE ABOVE ENTITLED CAUSE, APPEALED FROM THE DISTRICT COURT OF TULSA COUNTY.

AFFIRMED

NOW, THEREFORE, YOU ARE HEREBY COMMANDED TO CAUSE SUCH AFFIRMANCE TO SHOW OF RECORD IN YOUR COURT AND TO ISSUE SUCH PROCESS AND TAKE SUCH OTHER AND FURTHER ACTION AS MAY BE IN ACCORD WITH RIGHT AND JUSTICE AND SAID OPINION.

WITNESS, THE HONORABLE RUDOLPH HARGRAVE, CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF OKLAHOMA, AT THE CITY OF OKLAHOMA CITY, THIS 06TH DAY OF APRIL, 1989.

JAMES W. PATTERSON,
Clerk

By: /s/
Deputy

APPENDIX "B"

IN COURT OF APPEALS, DIVISION 4
STATE OF OKLAHOMA

AMERICAN AIRLINES, INC.,

Appellee,

vs.

EX-CELL-O CORPORATION,

Appellee,

and

NATIONAL AUTOMATIC PRODUCTS COMPANY and COMMERCIAL TECHNOLOGY, INC.,

Appellants.

FILED
COURT OF APPEALS
STATE OF OKLAHOMA
MAR - 7 1989
JAMES W. PATTERSON
CLERK

No. 68,771
NOT FOR PUBLICATION

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

Honorable Daniel J. Boudreau, Trial Judge

Stephen P. Friot
Barbara L. Swimley
Spradling, Alpern, Friot & Gum
Oklahoma City, Oklahoma — For Appellees

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Kelly & Gambill
Pawhuska, Oklahoma

Joe B. Abbey
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Dallas, Texas — For Appellants

MEMORANDUM OPINION

BACON, J.

This is an appeal from a judgment based on a jury verdict in favor of American Airlines for damages occasioned by a defective fuel nozzle nut that caused a fire which damaged a jet engine and test cell.

In August 1982, American Airlines, Inc., (American) filed suit against United Technologies, Inc. (United), Ex-Cell-O Corporation (Ex-Cell-O), and National Automatic Products Company (NAPCO) for damages due to an alleged defective fuel nozzle nut.

The fuel nozzle nut was manufactured by NAPCO, who in turn sold it to Ex-Cell-O, who in turn sold it to Pratt and Whitney, a division of United, who in turn sold it to American. American's suit was based on negligence, breach of implied warranty, and manufacturer's products liability as to all defendants.

Thereafter, American filed amended petitions joining Commercial Technologies, Inc. (Commercial) and Comtec, Inc., as additional defendants, alleging that NAPCO was an instrumentality of Commercial and Comtec, and that they should be held liable along with NAPCO.

Ex-Cell-O filed a cross-petition against NAPCO, Commercial, and Comtec for indemnification. All of the defendants filed special appearances and motions to quash and pleas to the jurisdiction. The trail court granted the motions of United and NAPCO. American, in turn, appealed and on January 20, 1985, in case No. 60,005, the Supreme Court reversed and remanded the order to the trial court, finding that there was personal jurisdiction as to NAPCO, Commercial, and United.

Prior to trial, American settled with United and dismissed United with prejudice. American also settled with Ex-Cell-O,

and thereafter, American and Ex-Cell-O proceeded to trial against NAPCO, Commercial and Comtec.

Based on a motion made by NAPCO, the trial court bifurcated the proceedings. The first trial was to determine the liability of NAPCO, if any, and determine the amount of the damages, if any. The jury found NAPCO liable and fixed damages at $944,545.90.

The second trial was to determine whether NAPCO was an instrumentality of either Commercial or Comtec, or both, and thus liable for the same damages. At the conclusion of the second trial, the jury found that NAPCO was an instrumentality of Commercial, but not Comtec.

NAPCO and Commercial filed timely motions for a new trial which were overruled by the trial court. It is from this ruling that they appealed. Subsequently, American assigned any interest in the judgment appealed from to Ex-Cell-O.

After briefing was concluded, Ex-Cell-O and Commercial entered into a settlement agreement, and the parties agreed to dismiss the pending appeal as to Commercial only. Thus, the issues of error raised on appeal are moot as to Commercial only and we address only those points of error raised by NAPCO, the sole remaining appellant.

The first issue to be addressed is the alleged lack of personal jurisdiction as to NAPCO. This issue has already been decided in Case No. 60,005, wherein the court held that the order of the trial court dismissing United, Ex-Cell-O, and NAPCO was reversed and remanded for a determination on the merits. Once the question of jurisdiction has been raised and decided, that operates to disallow any future litigation of that issue. *Veiser v. Armstrong*, 688 P.2d 796, 802 (Okla. 1984).

Also raised as error is the denial by the trial court of a continuance when NAPCO's expert witness, Mr. Richard Allen

Smith, was hospitalized and unable to appear. The trial court talked to the doctor and determined that he could be deposed and ordered the parties to do so on a day certain before trial. NAPCO did not do so. NAPCO sought to offer segments of an earlier deposition dealing with matters requiring expertise in a certain area. The trial court examined the deposition and concluded that there was no evidence Mr. Smith was qualified as an expert by knowledge, skill, experience, training, or education in subject area.

NAPCO then sought to have Mr. Lennehan substitute as an expert witness. He had at one time been endorsed as a witness, but NAPCO withdrew his name, and thus, no discovery had been conducted as to the testimony of Mr. Lennehan. The trial court denied the request.

The question of the qualifications of an expert witness is left to the sound discretion of the trial court, and its ruling will not be disturbed on appeal in the absence of a showing of abuse of discretion. *City of Holdenville v. Griggs*, 411 P.2d 521 (Okla. 1966).

We find no abuse of discretion on the part of the trial court in its ruling as to the lack of qualifications of Mr. Smith as an expert witness, nor the denial of the request for Mr. Lennehan to testify as a substitute for Mr. Smith when his name had been withdrawn as a witness and he was not listed on the pre-trial order.

Allowing or denying admission of evidence rests in the sound discretion of the trial court. *Jordan v. General Motors Corporation*, 590 P.2d 193, 196 (Okla. 1979). Upon review of the record we find no reversible error in respect to the trial court's decisions on the admissibility or inadmissibility of either evidence or testimony.

Where the trial court exercises its sound discretion in passing on the question of mistrial, its finding cannot be

disturbed on appeal in the absence of a clear abuse of discretion. *Jordan, supra,* 195. We find no such abuse.

NAPCO urges error on the part of the trial court in admitting evidence of the 1972 convictions of Mort Zimmerman, as principal officer of Commercial, on three counts of mail fraud and securities fraud. 12 O.S. 1981 § 2609(B), permits the introduction of a conviction over ten years old if its probative value substantially outweights its prejudicial effect, and NAPCO was given sufficient advance notice of the intent to use such evidence. *United States v. Cathey,* 591 F.2d 268, 275 (5th Cir. 1979).

We find that the trial court did not err in admitting the witness's crimes involving dishonesty over ten year ago, in that we cannot say the prejudicial effect of such evidence substantially outweighted its probative value.

It is additionally urged that the trial court erred in applying Oklahoma manufacturers' products liability law, which imposes strict liability, rather than "federal procurement law." This is premised on the contract standards of quality control being government military standards, i.e., MLT-STD-105D, in the manufacture of the fuel nozzle nut.

NAPCO's proposition is that either preemption or federal contract law should prevail over state law. We find no uniquely federal interests involved herein nor any congressional authority to fashion a federal common law as to product liabilities. *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 68 L.ed.2d 500, 101 S.Ct. 2061 (1981).

Where conflicting evidence has been presented to the jury and its verdict is supported by competent evidence, it will not be disturbed on appeal. *Mitchell v. Ford Motor Credit Co.,* 688 P.2d 42 (Okla. 1984). We find there is competent evidence to support the verdict of the jury.

The judgment of the trial court is in all respects is AFFIRMED.

BRIGHTMIRE, P.J., concurs, and RAPP, J., dissents.

RAPP, J., dissenting

This is an issue of products liability not at all dissimilar to the old rhyme — "for want of a nail a shoe was lost, for want of a shoe, a horse . . . ."[1] Here, a nut's wrong dimension resulted in a sequence of events culminating in an engine test cell fire. The issue of products liability was: did NAPCO manufacture and put into the stream of commerce a nut not in conformity with its engineering specifications? The evidence was that it did at some point during the years 1979 and 1980. Moreover, the evidence indicated a dimensional problem existed with this type of nut in NAPCO's manufacturing process as early as 1976, which required it to initiate one hundred percent inspection.[2] This manufacturing problem apparently continued at least through 1980, when the nut was manufactured.

NAPCO was acquired by H.P. Townsend Co. in 1979. Comtec was organized in March 1980. Zimmerman was chairman of the board of directors of Comtec. Comtec subsequently acquired NAPCO.

Zimmerman's first contact with NAPCO was in August 1979, when NAPCO contracted with a separate company to provide it with financial and legal functions and tax reporting services. Zimmerman was a member of this company's staff. The record is totally devoid of any evidence Zimmerman was involved in any manner with either the engineering and development or manufacturing of the nut in question.

[1] George Herbert, "Love."

[2] It is well known within manufacturing that even one hundred percent inspection will not find and remove all defective units. Acheson J. Duncan, *Quality Control & Industrial Statistics* (1962).

The purported usage of Zimmerman's conviction for mail fraud and securities violations for impeachment purposes was so far removed from the reality of the trial issues as to be patently asinine. It was intended and used for a single purpose in contravention of the statute's intent regarding convictions in excess of ten years[3] — to smear and diminish not only the testimony and character of Zimmerman, but also of all associated with him. His conviction had no probative value nor was it even remotely connected with the principal issue, other than to function as a firebrand to inflame the jury and induce bias and prejudice into their minds. It is obvious it did this work well. Accordingly, I would hold this single issue prevented a fair and impartial trial and so blinded the jury that it must be reversed and remanded for a new trial.

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[3] Title 12 O.S.1981 § 2609; *see also* Fed. R. Evid. 404(a), which strictly limits when character evidence may be admitted to show acts in conformity with the criminal conviction. The court, in *Perrin v. Anderson*, 784 F.2d 1040, 1044 (10th Cir. 1986), stated, "Although the literal language of the exceptions to Rule 404(a) applies only to criminal cases, we agree with the District court here that, when the central issue involved in a civil case is in nature criminal, the defendant may invoke the exceptions to Rule 404(a)." Here, in this matter under review, the question and issue were strictly civil.

APPENDIX "C"

IN THE
DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

AMERICAN AIRLINES, INC.,

Plaintiff,

vs.

UNITED TECHNOLOGIES, INC., EX-CELL-O CORPORATION, NATIONAL AUTOMATIC PRODUCTS COMPANY, COMTEC, INC., and COMMERCIAL TECHNOLOGY, INC.,

Defendants.

Case No. CT-82-739

JUDGMENT

BE IT REMEMBERED, that on the 9th, 10th, and 11th days of March, 1987, this action came on for jury trial on the claims of the plaintiff, American Airlines, Inc., and of the defendant, Ex-Cell-O Corporation, against the defendant, National Automatic Products Company, and that on the 12th and 13th days of March, 1987, this action came on for jury trial on the claims of the plaintiff, American Airlines, Inc., and the defendant, Ex-Cell-O Corporation, against the defendants, Comtec, Inc. and Commercial Technology, Inc., the plaintiff, American Airlines, Inc. appearing by its counsel, H. Jerome Gette and Lyle B. Sinell, of the firm of Robins, Zelle, Larson & Kaplan, the defendant, Ex-Cell-O Corporation, appearing by its counsel, Stephen P. Friot and Barbara L. Swimley, of Spradling, Alpern, Friot & Gum, the defendant, National Automatic Products Company appearing by its counsel, Joe Abbey, and B. David Gambill, and the defendants Comtec, Inc. and Commercial Technology, Inc. appearing on the 12th and 13th days of March, 1987, by their counsel, B. David Gambill.

WHEREUPON, on the 9th day of March, 1987, the court, on motion of the defendants, National Automatic Products Company, Comtec, Inc. and Commercial Technology, Inc., bifurcated the trial of the issues in this action, directing that the product liability and indemnity claims asserted against the defendant, National Automatic Products Company, be tried to a jury, following which, in the event of a verdict against the defendant, National Automatic Products Company, the claims asserted against Comtec, Inc. and Commercial Technology, Inc. would be tried to the same jury.

WHEREUPON, a jury was duly empaneled and sworn to well and truly try the issues and the plaintiff, American Airlines, Inc., presented its evidence and rested and the defendant, Ex-Cell-O Corporation presented its evidence and rested. The court overruled the demurrer to the evidence lodged by the defendant, National Automatic Products Company, to the evidence of the plaintiff, American Airlines, Inc. and of the defendant, Ex-Cell-O Corporation, whereupon the defendant, National Automatic Products Company, proceeded to present its evidence and rest. The court overruled all parties' motions for directed verdict, following which, all parties agreed that the issues would be submitted to the jury as a single claim for damages by the plaintiff, American Airlines, Inc., and that any necessary allocation between the plaintiff, American Airlines, Inc. and the defendant, Ex-Cell-O Corporation, on account of the indemnity claim of the defendant, Ex-Cell-O Corporation, would be determined by the court after receiving the verdict with respect to the product liability claims.

WHEREUPON, the issues were duly submitted to the jury, and, on the 11th day of March, 1987, the jury returned a verdict (a) in favor of the plaintiff, American Airlines, Inc., and against the defendant, National Automatic Products Company, on the plaintiff's Manufacturer's Products Liability claim; (b) in favor of the defendant, National Automatic Products Company, and against the plaintiff, American Airlines, Inc., on the plaintiff's

negligence claim; and (c) in favor of the plaintiff, American Airlines, Inc., and against the defendant, National Automatic Products Company, on the plaintiff's claim for breach of implied warranty of merchantibility, and fixed the amount of the damages caused by the casualty which is the subject of this action at Nine Hundred Forty Four Thousand Five Hundred Forty Five and 90/100 Dollars ($944,545.90).

WHEREUPON, on the 12th day of March, 1987, the action came on for further jury trial as to the claims of the plaintiff, American Airlines, Inc., and of the defendant, Ex-Cell-O Corporation, against the defendant, Comtec, Inc. and the defendant, Commercial Technology, Inc. The plaintiff, American Airlines, Inc. and the defendant, Ex-Cell-O Corporation, proceeded to present their evidence and rested. The court overruled the demurrer lodged by the defendants, Comtec, Inc. and Commercial Technology, Inc. to the evidence of the plaintiff, American Airlines, Inc. and of the defendant, Ex-Cell-O Corporation, whereupon the defendants, Comtec, Inc. and Commercial Technology, Inc. rested. The court overruled all parties' motions for directed verdict.

WHEREUPON, the issues were duly submitted to the jury, and, on the 13th day of March, 1987, the jury returned a verdict determining that the defendant, Commercial Technology, Inc., is liable for the judgment entered herein against the defendant, National Automatic Products Company, and that the defendant, Comtec, Inc., is not liable for the judgment entered herein against the defendant, National Automatic Products Company.

The court finds that, of the Nine Hundred Forty Four Thousand Five Hundred Forty Five and 90/100 Dollars ($944,545.90) found by the jury as damages herein, the sum of Six Hundred Thousand and no/100 Dollars ($600,000.00) should be adjudicated to be an offset against the damages otherwise awardable to the plaintiff, American Airlines, Inc., and that judgment for said sum of Six Hundred Thousand and no/100 Dollars ($600,000.00) should be entered in favor of the

defendant, Ex-Cell-O Corporation, and against the defendants, National Automatic Products Company and Commercial Technology, Inc., pursuant to the indemnity claim of the defendant, Ex-Cell-O Corporation.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that the plaintiff, American Airlines, Inc., have and recover judgment against the defendants, National Automatic Products Company and Commercial Technology, Inc., jointly and severally, in the amount of Three Hundred Forty Four Thousand Five Hundred Forty Five and 90/100 Dollars ($344,545.90), plus the sum of Three Hundred Forty Nine Thousand One Hundred Ninety Seven and 33/100 Dollars ($349,197.33), as pre-judgment interest at the rate of six percent (6%) per annum on Nine Hundred Forty Four Thousand Five Hundred Forty Five and 90/100 Dollars ($944,545.90) from December 29, 1980 to February 26, 1987, the date of the payment made by the defendant, Ex-Cell-O Corporation to the defendant, American Airlines, Inc., plus the sum of Seven Hundred Thirty Six and 29/100 Dollars ($736.29) as a pre-judgment interest at the rate of six percent (6%) per annum on Three Hundred Forty Four Thousand Five Hundred Forty Five and 90/100 Dollars ($344,545.90) from February 27, 1987 to March 11, 1987 for a total judgment in favor of the plaintiff, American Airlines, Inc., and against the defendants, National Automatic Products Company and Commercial Technology, Inc., jointly and severally, in the amount of Six Hundred Ninety Four Thousand Four Hundred Seventy Nine and 52/100 Dollars ($694,479.52), said sum to bear interest at the rate of 10.03% per annum until paid, plus costs and such attorney's fees, if any, as may be hereinafter awarded by the court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the defendant, Ex-Cell-O Corporation, have and recover judgment against the defendants, National Automatic

Products Company and Commercial Technology. Inc., jointly and severally, in the amount of Six Hundred Thousand and no/100 Dollars ($600,000.00), plus the sum of One Thousand Eighty Four and 93/100 Dollars ($1,084.93), as prejudgment interest at the rate of six percent (6%) per annum on Six Hundred Thousand and no/100 Dollars ($600,000.00) from February 26, 1987 to March 11, 1987 for a total judgment in favor of the defendant, Ex-Cell-O Corporation, and against the defendants, National Automatic Products Company and Commercial Technology, Inc., jointly and severally, in the amount of Six Hundred One Thousand Eighty Four and 93/100 Dollars ($601,084.93), said sum to bear interest at the rate of 10.03% per annum until paid, plus costs and such attorney's fees, if any, as may be hereinafter awarded by the court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that all matters pertaining to the awarding of attorney's fees shall be determined in further proceedings herein, as provided in the Pretrial Conference Order entered herein on March 9, 1987.

/s/ DAN BOUDREAU

Dan Boudreau,
District Judge

APPROVED AS TO FORM:

H. JEROME GETTE
/s/ GENE C. BUZZARD

H. Jerome Gette and
Gene C. Buzzard,
Attorneys for Plaintiff,
American Airlines, Inc.

/s/ STEPHEN P. FRIOT

Stephen P. Friot,
Attorney for Defendant,
Ex-Cell-O Corporation

JOE B. ABBEY
/s/ B. DAVID GAMBILL

Joe B. Abbey
and B. David Gambill,
Attorneys for Defendants,
National Automatic Products
Company, Comtec, Inc., and
Commercial Technology, Inc.

APPENDIX "D"

IN THE
SUPREME COURT OF
THE STATE OF OKLAHOMA

AMERICAN AIRLINES, INC., a Delaware Corporation, *Appellant,* vs. UNITED TECHNOLOGIES, INC., EX-CELL-O CORPORATION, and NATIONAL AUTOMATIC PRODUCTS COMPANY, *Appellees.*	No. 60,005

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY

Honorable Clifford E. Hopper

Appeal from nunc pro tunc order granting motions to dismiss for lack of personal jurisdiction over nonresident corporations pursuant to 12 O.S. 1981, § 1701.3.

REVERSED AND REMANDED

H. Jerome Gette
Robins, Zelle, Larson &
Kaplan
Dallas, Texas

Gene C. Buzzard
Waddel & Buzzard
Tulsa, Oklahoma

For Appellant,
American Airlines, Inc.

Kirk D. Fredrickson
James T. Dupré
Fredrickson, Merrick & Patton
Oklahoma City, Oklahoma

L. Ray Pearce
The Carlton Firm
Dallas, Texas

For Appellees,
National Automatic
Products Co., Comtec,
Inc., & Commercial
Technology, Inc.

DOOLIN, J.

We must determine, consistent with due process requirements, whether a nonresident tool manufacturer which conforms its parts to the specifications of users and a nonresident distributor of those parts may be sued in Oklahoma, where the allegedly defective part was delivered and where it caused substantial property damage to the user.

The facts of this action are undisputed. Pursuant to customer specifications, defendant NAPCO manufactures aircraft parts and components. In this case, Napco manufactured fuel nozzel nuts according to specifications provided by, and an order placed by, defendant Ex-Cell-O. The nuts were then delivered "F.O.B. Connecticut" to a carrier for shipment to Ex-Cell-O's Michigan plant, where they were shipped "F.O.B." to defendant United Technologies, Inc. (United) in Connecticut. United, in turn, sold the nuts to American Airlines. Shipping

them "F.O.B. Connecticut" to New York. American then transported the nuts to its aircraft maintenance facility in Tulsa, Oklahoma. After the nut was installed in a JT-9 engine, its allegedly improper tolerances allowed fuel to leak and ignite, thereby damaging American's property in the amount of $1,000,000.

A suit based on negligence, implied warranty, and strict liability was brought against NAPCO, Ex-Cell-O and United Technologies, Inc. in the District Court of Tulsa County. Comtec, Inc. (Comtec) and Commercial Technology, Inc. (Commercial), the alter egos of NAPCO, were later joined as additional defendants. These defendants each filed a special appearance and a motion to contest personal jurisdiction. After a hearing on the motions, it was stipulated that Ex-Cell-O would not contest Oklahoma jurisdiction unless NAPCO and United were held subject to it. Similarly, liability of Comtec and Commercial would exist only if NAPCO is liable.

By its nunc pro tunc order, the trial court granted the NAPCO and United motions to dismiss and subsequently granted the Comtec and Commercial motions to dismiss. From these orders dismissing the defendants for lack of personal jurisdiction, American appeals.

The Supreme Court, in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), and *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945), determined that a nonresident is subject to personal jurisdiction in a forum with which he has minimum contacts if doing so does not offend the traditional notions of fair play and substantial justice. The substantiality of contact with a forum state, however, is determined by the facts of each individual case. *Vacu-Maid v. Covington*, 530 P.2d 137, 139 (Okl. 1974).

In Oklahoma, personal jurisdiction over a nonresident is governed by 12 O.S. 1981, § 1703.03, which provides:

> "(a) A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's
>
> (1) transacting any business in this state;
>
> (2) contracting to supply services or things in this state;
>
> (3) causing tortious injury in this state by an act or or omission in this state;
>
> (4) causing tortious injury in this state by act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state;
>
> (5) having an interest in, using, or possessing real property in this state; or
>
> (6) contracting to insure any person, property, or risk located within this state at the time of contracting, or
>
> (7) maintaining any other relation to this state or to persons or property including support for minor children who are residents of this state which affords a basis for the exercise of personal jurisdiction by this state consistently with the Constitution of the United States.
>
> (b) When jurisdiction is based solely upon this section, the defendant's appearance does not authorize the exercise of personal jurisdiction except as to a cause of action or claim for relief arising in the circumstances enumerated in this section."

This "Long arm" statute extends jurisdiction of Oklahoma courts over nonresidents to the outer limit permitted by the due process clause of the 14th Amendment. That clause does not permit a state to "make binding a judgment *in personam*

against an individual or corporate defendant with which the state has *no contacts, ties, or relations.*" *Henderson v. University Associates, Inc.*, 454 F. Supp. 493, 494 (N.D. Okl. 1977) [emphasis added]. Further, it is not the conduct of the plaintiff that determines jurisdiction, but the conduct of the defendant. *Jem Engineering & Mfg., Inc. v. Toomer Electrical Co.*, 413 F. Supp. 481 (N.D. Okl. 1976).

The Court of Appeals in *Vacu-Maid, supra*, stated that personal jurisdiction unquestionably would be upheld, "where the nonresident defendant is a seller who has shipped goods into Oklahoma, even if such shipment were an isolated or infrequent occurrence." It makes no difference whether the nonresident deals directly or indirectly with the residents of the forum state. *Carmack v. Chemical Bank New York Trust Co.*, 536 P.2d 897, 900 (Okl. 1975). However, it is essential that the nonresident "*purposefully* avails himself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hudson v. Hudson*, 569 P.2d 521, 524 (Okl. App. 1976) [emphasis added], citing from *Hanson v. Denckla*, 357 U.S. 235 (1958).

The Oklahoma Supreme Court has denied personal jurisdiction where the nonresident transacted no business in Oklahoma, engaged in no relationship with a resident in any transaction, and had no offices, employees, agents, or representatives in the state. *Barnes v. Wilson*, 580 P.2d 991, 993 (Okl. 1978); *Architectural Building Components Corp. v. Comfort*, 528 P.2d 307, 319 (Okl. 1974). The Court also did not exercise personal jurisdiction over the nonresident corporation in *Precision Polymers, Inc. v. Nelson*, 512 P.2d 811 (Okl. 1973). In *Precision*, the nonresident manufacturer who fabricated allegedly defective materials for construction projects in Oklahoma and Missouri, sold these materials to a nonresident distributor, and delivered them to sites in Oklahoma. However, the manufacturer never transacted any business or committed any act in Oklahoma in connection with the Missouri project,

the subject of the lawsuit. Because the manufacturer commited no act to subject it to Oklahoma jurisdiction, jurisdiction was denied.

Jurisdiction has been upheld, however, where a nonresident manufacturer who fabricated defective component parts of an aircraft outside the forum state, sold them within the state where death occurred, and derived substantial revenues from the sales in the forum state. *Paddock v. Bensen Aircraft Corp.*, 293 F.Supp. 745 (W.D. Okl. 1968). Jurisdiction also was found where a nonresident, who had caused tortious injury in the forum state, merely gained substantial revenues therein. *Oral Roberts Univ. v. Automatic Switch Co.*, 319 F.Supp. 381 (N.D. Okl. 1970).

At first glance the present case seems aligned with *Precision, supra,* but it is clearly distinguishable. That is, we are confronted with a nonresident manufacturer, supplier, and distributor, but we cannot say that these entities maintained no relations with, or ties to, Oklahoma.

The record establishes sufficient contacts with the State. The United representative testified in his deposition that the fuel nozzle nut was designed for national and international distribution. To reach these markets, United advertises in national periodicals and engages in "vigorous and very fine advertising * * * on television and in the papers: although it focuses on no given state. While it (or its division, Pratt & Whitney) conducts no sales, transfers no title, and warehouses no goods in Oklahoma, Oklahoma is one state likely to receive a greater portion of its products. In fact, in 1979, 1980 and 1981, United indirectly supplied goods to Oklahoma. American estimates that it alone used $80,000,000 worth of parts in Oklahoma in 1980 and 1981. In addition to deriving substantial revenues from Oklahoma, United maintains personnel at Tinker AFB and at American's overhaul facility in Tulsa. With regard to United, its activities were sufficient to establish the

minimum contacts required by law, and it was an abuse of discretion for the trial court to hold otherwise.

The NAPCO representative also testified that his company "intended to serve as much of the nationwide market as it could." In fact, it expected that the fuel nozzel nut would "end up" at whatever service facilities demanded them. American estimated that it received 492 fuel nozzel nuts, resulting in gross revenues to NAPCO of $14,760 to $24,000. While NAPCO's ties to Oklahoma are less than United's, they still fall well within the minimum contacts required by due process.

Although the nonresident defendants actively court the State of Oklahoma for business, either directly or indirectly, they attempt to escape liability for damage caused therein merely by designating the place of title transfer (F.O.B. Connecticut) as the proper forum in wich to be sued. Such conduct frustrates, not enhances, the notions of fair play and substantial justice, and is a perfect example of one who bites the hand that feeds it.

Accordingly, the orders of the trial court dismissing the defendants for lack of personal jurisdiction are reversed and the cause is remanded for a determination on the merits.

REVERSED AND REMANDED.

Barnes, Opala, Wilson, Kauger, JJ. — concur
Simms, C.J., Hodges, Lavender, Hargrave, JJ. — dissent

APPENDIX "E"

IN THE
DISTRICT COURT FOR TULSA COUNTY,
STATE OF OKLAHOMA

DISTRICT COURT
FILED
MAY 13, 1983
DON E. AUSTIN,
COURT CLERK
STATE OF OKLA.
TULSA, COUNTY

AMERICAN AIRLINES, INC.,

Plaintiff,

v.

UNITED TECHNOLOGIES, INC.,
a Delaware corporation,
EX-CELL-O CORPORATION, a
Michigan Corporation, and
NATIONAL AUTOMATIC PRODUCTS
CO., a corporation

Defendants.

No. CT-82-739

FINDINGS AND CONCLUSIONS IN SUPPORT OF ORDER OF DISMISSAL

This is a subrogation action brought for and on behalf of American Airlines, Inc., and its insurer, Industrial Risk Insurors. Plaintiffs seek property damage caused by fire which occurred in the servicing of a jet engine. It is alleged that various non-resident defendants are liable by reason of having manufactured and sold a part which is claimed to have caused the accident. Each defendant objected to the in personam jurisdiction of the Oklahoma courts by proper motion, and defendants United Technology Corporation, National Automatic Products Co., Commercial Technology, Inc., and Comtec, Inc., were subsequently dismissed for lack of personal jurisdiction.

The jurisdictional dismissals were based in part on statements and responses of counsel to questions propounded by the Court at the time of oral argument on February 23, 1983, and

which are not reflected in the record. Accordingly, the Court makes the following findings and conclusions:

1. The burden of proof is on the plaintiff to establish in personam jurisdiction. The jurisdiction must appear affirmatively from the record. Plaintiff has failed to meet the burden of proof in this regard.

2. This action arises out of a commercial transaction between large sophisticated corporations where all parties chose to do business in the State of Connecticut.

3. There is no question but that the State of Connecticut has subject matter jurisdiction over the controversy and in personam jurisdiction over all parties to the litigation.

4. In the interest of judicial economy and to avoid unnecessary confusion and expense it is important that all issues between plaintiff and the defendants, and between the defendants themselves, be resolved in a forum which has jurisdiction over all parties.

5. This identical cause of action is presently pending between the identical parties in the courts of the State of Connecticut where there is no question of jurisdiction over the parties.

6. Oklahoma jurisdiction as to each defendant is not clear, but is questionable at best.

7. Plaintiff's cause of action did not arise out of any acts of defendants within the State of Oklahoma.

8. Contrary to responses and answers to interrogatories, counsel for plaintiff admitted during oral argument that American Airlines bought the fuel nozzle nut in the State of Connecticut, and title passed in that state.

9. Counsel for plaintiff further agreed during oral argument that the part was brought into the State of Oklahoma by the plaintiff, American Airlines.

10. Public policy considerations which might be applicable to individual consumers are not applicable to this case involving arms-length commercial transactions between major corporations.

11. There is no evidence of any affirmative action by defendants within Oklahoma so as to seek the protection and advantages of our laws and otherwise subject themselves to the jurisdiction of this Court.

12. The United States Constitution grants a degree of protection to all parties so that by structuring preliminary conduct they can limit the jurisdictions in which they may be haled into court.

13. Plaintiff's market and revenue theories are insufficient to support in personam jurisdiction in this case, and are rejected. Even if a defendant intended to serve a national or worldwide market, constitutional due process still permits a defendant to structure his preliminary conduct so as to have a degree of predictability as to where he may be sued in commercial transactions. Defendants in this case structured their conduct so as to avoid the Oklahoma jurisdiction, and it would be unfair for defendants to be subject to suit anywhere in the world in which an airplane flies or may be serviced.

14. The dismissals in this case are further supported under the doctrine and concept of Comity. Since the identical lawsuit between the identical parties is pending in both the State of Oklahoma and in the State of Connecticut it is the opinion of this Court that Oklahoma should defer to Connecticut where the parties chose to do business and where personal jurisdiction is not an issue.

/s/ CLIFFORD L. HOPPER

Clifford L. Hopper
District Judge

APPENDIX "F"

IN THE
SUPREME COURT OF THE
STATE OF OKLAHOMA

NATIONAL AUTOMATIC PRODUCTS CO. *Appellant* v. AMERICAN AIRLINES, INC. *Appellee*	No. 60,005 (Court of Appeals) No. 68,771

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that National Automatic Products Co., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the; State of Oklahoma.

This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Respectfully submitted

LAW OFFICES OF JOE B. ABBEY
1717 Main Street
Suite 2220
Dallas, Texas 75201
(214) 748-0423

By: /s/ JOE B. ABBEY
Joe B. Abbey
Bar No. 00789000

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Petition for Writ of Certiorari was placed in the United States Mail addressed to the Clerk of the United States Supreme Court of the United States, Washington, D.C. 20543 and the attorney of record, Stephen P. Friot, Spradling, Alpern, Friot & Gum, 101 Park Avenue, Suite 700, Oklahoma City, Oklahoma 73102 and the Attorney General for the State of Oklahoma at 112 State Capitol Building, Oklahoma City, Oklahoma 73105 on this the 22nd day of June, 1989.

Joe B. Abbey
Counsel for Petitioner